82-1488

No.

IN THE

Supreme Court of the United States

WILLARD NEWTON,
Plaintiff-Petitioner,

vs.

FEDERAL BARGE LINES, INC.,
Defendant-Respondent.

On Petition for Writ of Certiorari
from the United States Court of Appeals
for the Seventh Circuit (No. 81-2826)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed 2d 147, 94 S.Ct. 1011 (1974), creating an exception to the arbitration bar, is limited to claims founded upon federal statutory rights, and whether the *Alexander* exception should have been applied in this case.

2. Whether an arbitration can bar claims neither decided in, or proper to, the arbitration on the basis that they are closely related to the arbitration claim.

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OPINIONS BELOW

The opinions delivered in the courts below were unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit was signed and entered on October 25, 1982. A Petition for Rehearing was filed and denied on December 6, 1982. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

45 U.S.C. § 55

§ 55. Contract, rule regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.

45 U.S.C. § 60

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be con-

strued to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.

STATEMENT OF THE CASE

This case was decided adversely to the plaintiff on the pleadings. The facts as set out in the plaintiff's pleading are as follows:

Plaintiff, Willard Newton, was employed by Federal Barge Lines in a variety of capacities from 1954 until December 20, 1978. On that date, one day after a jury returned a verdict finding him entitled to damages as a result of the unseaworthiness of defendant's vessel on September 23, 1973, he was terminated by the defendant.

The plaintiff had been off work for eight months after the 1973 incident, but had returned to work for defendant in May 1974 and had continued working from that date through the date of the personal injury verdict without any difficulties. The testimony at the personal injury trial was uncontradicted that there was nothing about the plaintiff's condition that would interfere with his work, and that the plaintiff was returning to work after the trial. Plaintiff did not therein request any damages for future economic loss, or loss of earning capacity and none were awarded.

Defendant nonetheless discharged the plaintiff the day after the personal injury verdict, ostensably on the basis that, until

the trial, it was not aware of the nature and extent of the plaintiff's medical condition, and that this new knowledge of his medical condition justified the discharge on a medical basis.

At the time of the discharge, both the plaintiff and defendant were parties to a labor contract which provided a grievance procedure for resolving disputes between the company and its employees. As part of that procedure, matters which could not be mutually resolved between the parties were referred to bonding arbitration. The only provision in the agreement relating to discharge provided that an employee could not be peremptorily discharged, but could only be discharged for justification.

Subsequent to his discharge, the plaintiff did pursue a grievance which went to arbitration. A panel of arbitrators ruled that defendant had justification under the contract for discharging the plaintiff on medical grounds.

The plaintiff subsequently filed the instant lawsuit in state court charging defendant with engaging in a practice and pattern of firing employees for successful pursuit of their rights under the Jones Act and General Maritime Law; retaliatory discharge; fraud; misrepresentation; outrage; and for violation of 45 U.S.C. §§ 55 and 60. The defendant removed the case to the United States District Court on the basis that it presented a question of federal substantive law under Section 301(a), Labor Management Relations Act, 29 U.S.C. § 185(a)

All counts of the plaintiff's complaint were decided adversely to him on the pleadings, upon findings that they failed to state a cause of action or were barred by the arbitration. The Seventh Circuit Court of Appeals affirmed these rulings holding that plaintiff's claims were either decided in, or closely related to issues decided in, the arbitration, and that *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974) provides an exception to the arbitration bar only to claims founded upon specific federal statutory causes of action.

ARGUMENT

This case presents two questions which are of sufficient importance to require a resolution by this court. One requires a construction of a prior decision of this court; the other requires a construction of the proper limits of any arbitration bar. In both instances, it is submitted that the lower court's construction was plainly wrong.

A. The Lower Court Improperly Limited This Court's Holding In *Alexander* v. *Gardner-Denver Co.*, To Create An Exception To The Arbitration Bar Only Where There Is An Independent Claim Founded Directly On Federal Statutory Rights.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974), this court held that a claim is not barred by a prior arbitration under a collective bargaining agreement where the claim is founded upon rights and policies independent from those contained in the agreement. The lower court in this case refused to apply the holding of *Alexander* beyond the specific facts there involved and held that *Alexander* applied only where the claim is founded upon a specific statutory right of action. This construction is in derogation of both the principles and policies underlying *Alexander* and places form over substance in construing the nature of the independent claim in this case.

In *Alexander*, the exception to the arbitration bar was based upon this court's recognition that claims founded upon authority other than the bargaining agreement may be based on, and promote, rights and policies which are different from those in the bargaining agreement, and that an arbitration under the bargaining agreement may not address or adequately protect such independent rights and policies. As stated therein:

> ... In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a

> collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence . . . the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus, the rationale behind the election-of-remedies doctrine cannot support the decision below. *Alexander,* 415 U.S. at 49-50.

The court's repeated emphasis in *Alexander* of the policy underlying the independent claim, and the inadequacy of the arbitration forum to protect and promote that policy, clearly indicates that it is the policy itself that justifies voiding the arbitration bar and not merely a statutory enactment of the policy. As was stated by the court:

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accomodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII. *Alexander,* 415 U.S. at 59-61.

Although the policy sought to be protected in *Alexander* happened to be evidenced by an enactment of a federal statute, there is nothing in *Alexander* to support the lower court's construction in this case that equally compelling policies can not exist outside of statutory enactment and can not be accorded the same treatment merely because found in expressions other than statutory enactment. The error of such limitation upon the *Alexander* rule is particularly evident in its application to this case.

In the situation presented by this case, both state and federal courts have explicitly recognized the right of the plaintiff, founded upon established public policy, not to be discharged in retaliation for pursuing his legal remedies. *Smith* v. *Atlas Off-Shore Boat Services, Inc.*, 653 F.2d 1057 (5th Cir. 1981); *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979).

This right having been judicially recognized and applied, there is no need for statutory enactment, and a concomitant probability that none will be had. The lack of statutory enactment, in such circumstances, however, cannot be held to dictate the validity, importance, or independence of the right and policy recognized, but more properly is attributed to the redundancy of a statute once the right is already established. To hold otherwise is to forever relegate the rights and policies recognized by our judiciary to a lower status than statutory rights.

The error of such a holding is particularly evident in this case, where the policy and right recognized is in the maritime law, an area where the judiciary historically has played the reading role in fashioning the controlling rules and reshaping the doctrine to meet changing conditions.

It is also evident upon a review of the source of the judicially recognized right and policy, which source is statutory enactment.

Indeed, this court itself recognized the inappropriateness of any statutory non-statutory distinction when it noted in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 that:

> Much of what is ordinarily regarded as "common law" finds its source in legislative enactment. *Moragne*, 26 L.Ed.2d at 352.

This is particularly true of the maritime right in the instant case. The *Smith* remedy forming the basis for the claim of the

plaintiff is specifically founded upon the legislative enactments mandating special solicitude to the rights of seamen, and finds its source in legislation and statutory enactment. The right being so founded, the lower court's distinction between statutory and common law is one of form without substance and should not be allowed to frustrate the important and compelling policy against relatiatory discharge.

The lower court's construction of *Alexander* to bar plaintiff's claims in this case was further in error because the plaintiff's claims were based on statutory violations, specifically alleged violations of 45 U.S.C. §§ 55 and 60.

Sections 55 and 60 of 45 U.S.C. prohibit an employer from in any way exempting itself from liability under the F.E.L.A. (and by incorporation the Jones Act), and from in any way preventing pursuit of the remedies under these acts. The federal courts have recognized that any conduct of an employer which has the effect of discouraging a present or potential litigant from asserting his claim under these acts is a violation of the sections. *Kozar* v. *Chesapeake & Ohio Railroad Co.*, 320 F.Supp. 335 (W.D. Mich. 1970); *Apitsch* v. *Patapsco & Back River R.R. Co.*, 385 F.Supp. 495 (D. My. 1974); *Hendley* v. *Central of Georgia Railroad Co.*, 609 F.2d 1146 (5th Cir. 1980).

Although a private cause of action for violation of these sections is not specifically provided in the sections, the above cases support such an action to effectuate the intent of the statutes. In any event, these statutory enactments are evidence of an important policy reduced to statute and were sufficient to satisfy any holding of *Alexander* that a claim must be premised upon a statutory enactment of a public policy.

B. The Lower Court Improperly Applied An Arbitration Bar To Claims Not Decided In, Or Proper To, The Arbitration.

The lower court, in holding that the plaintiff's claims were barred by the arbitration decision, ignored the established prin-

ciples that the arbitration could not decide the issues presented by plaintiff's claims, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974), and that a bar can apply only to the issues which are identical to two proceedings. See, e.g., *Dunlap* v. *City of Chicago*, 435 F. Supp. 1295 (N.D. Ill. 1977). The application of a bar, in this instance, to the entirety of plaintiff's claims, even though those claims went far beyond that which were or could have been decided in the arbitration, was error.

By terms of the employment contract in this case, the arbitration was necessarily limited to deciding whether there was "just cause" in the dismissal of the plaintiff. This limitation is well established by the law that arbitration is limited to resolving disputes within the four corners of a contract and cannot decide policies or issues outside of the contract. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed. 2d 147, 94 S.Ct. 1011 (1974).

By finding a bar to all of plaintiff's claims in this case, the lower court equated the finding of a contract interpretation of "just cause" for termination to negative findings of pretext, and of fraud and misrepresentations at the totally independent trial of plaintiff's personal injury claim. This extension of the finding of "just cause" is improper and unprecedented as the issues of pretext, fraud and misrepresentation, set out in plaintiff's complaint, are totally independent of resolution of the issue of "just cause".

The independent nature of the issue of pretext in *Becton* v. *Detroit Terminal of Consolidated Freightways*, 490 F.Supp. 464 (G.D. Mich. 1980), wherein the court stated:

> The inquiry now turns to the question of whether the plaintiff has shown that the just cause that did exist was merely a pretext to cover up what was in reality a racially discriminatory termination. 490 F.Supp. at 470.

Similarly, the independent nature of the issues of fraud or misrepresentations in obtaining a judgment was established in *Maicobo Investment Corp.* v. *Von Der Heide,* 243 F.Supp. 885 (D. My. 1965) and *Goodman* v. *Poland,* 395 F.Supp. 660 (D. My. 1975). Clearly, these cases belie this Court's equating of the issue "just cause" with the issues of pretext, fraud, and misrepresentation.

The Court's error is particularly evidence upon a review of the relationship between the claims that the court held justified the bar. The Court states that it applied the bar in this case, particularly with reference to Counts II and III, upon the finding that plaintiff's claims were *closely related* to the issue of "just cause" decided in the arbitration. This finding, however, is in direct conflict with the recognized limits of arbitration and applies a clearly erroneous test for application of a bar. Application of principles of estoppel, res judicata, and bar have never depended upon a finding of "close relationship". Rather, the requirement is one of *identity* of issues. *Dunlap* v. *City of Chicago,* 435 F.Supp. 1295 (N.D. Ill. 1977). There was no such identity in this case, and this Court's failure to require identity, and its holding that arbitrated issues were presented by plaintiff's claims was error. The lack of identity or, indeed, arbitrability, of the issues presented by plaintiff's claims is particularly evident in Counts II and III, which are founded on matters relating solely to representations of defendant during the trial of plaintiff's personal injury claim and are, therefore, totally outside of the employment contract.

CONCLUSION

For the foregoing reasons, it is submitted that this case presents issues of sufficient importance to require a resolution by this Court of the scope of *Alexander* and the bar by arbitration. It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Argued September 16, 1982
October 25, 1982

Before
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. William J. Campbell, Senior District Judge*

No. 81-2826

Willard Newton,
Plaintiff-Appellant,

vs.

Federal Barge Lines, Inc.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 77 C 5168
William Beatty, Judge.

(Unpublished Order Not To Be Cited Per Circuit Rule 35)

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* The Honorable William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

ORDER

Plaintiff Willard Newton (Newton) appeals an order of the district court dismissing counts two and three of plaintiff's complaint and granting defendant's Federal Barge Lines, Inc. (Federal Barge) motion for summary judgment as to the remaining counts, one and four. Plaintiff's complaint sought recovery against defendant for retaliatory discharge; plaintiff alleged that defendant discharged seaman Newton in retaliation for pursuing a personal injury action against defendant under the Jones Act, 46 U.S.C. § 688. The district court held that plaintiff's cause of action for retaliatory discharge was barred because it had been the subject of arbitration under a collective bargaining agreement to which Newton and Federal Barge were bound. We affirm.

I

Counts two and three of plaintiff's complaint alleged a fraudulent misrepresentation to plaintiff that his employment with Federal Barge would continue after his personal injury action against the company was resolved. To state a claim for fraudulent misrepresentation the plaintiff must show that the defendant has made "a false statement of material fact known or believed to be false by the party making it." *Soules* v. *General Motors Corp.*, 79 Ill. 2d 282, 402 N.E.2d 599 (1980). The district court found that no misleading representations were made to Newton, and dismissed the fraudulent misrepresentation counts of his complaint for failure to state a claim upon which relief could be granted. In addition, the district court held that these counts were so closely related to plaintiff's claim of retaliatory discharge as to be barred by the decision of the arbitrators on the retaliatory discharge claim. We agree.

II

Plaintiff's counts one and four, alleging retaliatory discharge, raised two issues before the district court. First, is the discharge of a seaman in retaliation for the exercise of his legal right to file a personal injury action against his employer actionable? Second, if a cause of action is found to exist for retaliatory discharge, does the decision of an arbitrator under a collective bargaining agreement bar such an action?

The Illinois Supreme Court has recognized a cause of action for retaliatory discharge where an at-will employee has been terminated in retaliation for filing a worker's compensation claim. *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The court based its holding on the remedial nature of the worker's compensation law, noting that the public policy expressed by this law "can only be effectively implemented and enforced by allowing a civil remedy for damages." *Id.* at ____, 384 N.E.2d at 358.

A cause of action for retaliatory discharge has also been allowed under the Jones Act. Like the worker's compensation law the Jones Act is a law of a remedial nature, intended to protect seamen in their employment relations. Thus, the Fifth Circuit, in *Smith* v. *Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981) held that an at-will seaman has an action for retaliatory discharge under general maritime law where a substantial motivating factor in his termination is that the seaman filed suit against his employer under the Jones Act. The Fifth Circuit reasoned that an "employer's conduct in discharging [an] employee constitutes an abuse of the employer's absolute right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy." *Id.* at 1062. Given the protective nature of the Jones Act, the cause of action for retaliatory discharge is a necessary corollary; an at-will seaman will be more inclined to pursue his

federally protected personal injury action against his employer if he may do so without fear of reprisal.

Although plaintiff Newton was not an at-will employee, the district court found the reasoning of *Kelsay* and *Smith* sufficiently persuasive to hold that plaintiff's complaint stated a cause of action in maritime law.

We need not reach this issue because even if plaintiff has stated a cause of action for retaliatory discharge in maritime law,[1] the district court properly held that the plaintiff in this case is barred by the arbitrators' decision under the collective bargaining agreement. The union contract which formed the basis of plaintiff's employment relationship with defendant called for compulsory and binding arbitration. Plaintiff, dissatisfied with the unfavorable decision of the panel of arbitrators, sought to have his claim reviewed anew in the federal courts. We believe, however, that

> [t]o permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would undermine the collective bargaining agreement. Grievance procedures, including arbitration, were set up to prevent industrial strife. *See United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409. To permit these procedures to be circumvented where the employee is protected by the procedures is to invite strife unnecessarily.

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[1] *Cf. Cook* v. *Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, 407 N.E.2d 95 (3rd Dist. 1980) (disallowing a tort action for retaliatory discharge where the employee in question was not terminable at will, but instead had recourse against his employer under a collective bargaining agreement allowing for arbitration of grievances).

Cook v. *Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, ____, 407 N.E.2d 95, 99 (3rd Dist. 1980).

We agree with the district court that plaintiff was protected adequately by the compulsory and binding arbitration.[2] The arbitrators found that plaintiff was discharged not in retaliation for his successful personal injury action against defendant, but for just cause related to medical evidence of which the defendant employer had been previously unaware. That decision was final and binding, *see United Steelworker's of America, supra,* and the district court properly held that the plaintiff's claim accordingly was barred.

AFFIRMED.

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[2] Plaintiff argues that the arbitration decision should not preclude a trial *de novo* on the retaliatory discharge claim. This argument is based on *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974), in which the Court held that arbitration decisions did not preclude trials *de novo* of Title VII claims. *Alexander* has been relied on to allow trials *de novo* in other instances where the claim arbitrated involved an independent, federally protected, *statutory* right. *See, e.g., Barrentine* v. *Arkansas-Best Freight System,* ____ U.S. ____, 101 S. Ct. ____ (1981) (minimum wage claims under the Fair Labor Standards Act); *Gardner* v. *Giarruso,* 571 F.2d 1330 (5th Cir. 1978) (claims under 42 U.S.C. § 1981); *Richardson* v. *National Post Office Mail Handlers,* 442 F. Supp. 188 (E.D. Va. 1977) (claims under the Labor Management Reporting and Disclosure Act). We know of no case, however, extending the *Alexander* holding to allow a trial *de novo* where the right plaintiff seeks to assert is grounded in common law rather than in federal statute. We see no reason to so expand the *Alexander* doctrine here since Newton's retaliatory discharge claim was considered and disposed of in the arbitration proceedings.

APPENDIX B

Judgment On Decision By The Court

(Filed October 16, 1981)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil Action File No. 79-5168

Willard Newton

vs.

Federal Barge Lines, Inc. and St. Paul Fire & Marine Insurance Company

Judgment

This action came on for (hearing) before the Court, Honorable William L. Beatty, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that summary judgment is entered in favor of defendant and against plaintiff.

Dated at Alton, Illinois, this 16th day of October, 1981.

B. D. HUDGENS, Clerk

/s/ By M. Ruth Brooks
Deputy Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 79 5168

Willard Newton,
Plaintiff,

vs.

Federal Barge Lines, Inc.,
Defendant.

ORDER

(Filed October 16, 1981)

Before the Court is the motion of defendant Federal Barge for summary judgment as to all counts of plaintiff's second amended complaint. Plaintiff in the instant case sets forth allegations of a discharge by Federal Barge Lines in retaliation for successful state court recovery for injuries received in the course of his employment. Plaintiff became an employee of defendant barge line in 1954 and served regularly, primarily as first mate, on defendant's vessels until he was injured on September 23, 1973. He was off work following the injury until May, 1974 at which time he returned to work for defendant and continued to perform his duties as first mate through the date of the verdict in state court, December, 1978. He was then suspended from his employment. A grievance was filed on plaintiff's behalf, pursuant to the collective bargaining agreement, and an arbitrator's decision was rendered on August 14, 1979 finding that the evidence did not support a conclusion that plaintiff's discharge was in retaliation for his successful damage suit. The decision further found that the arbitration record, in-

cluding the transcript of the state court trial, provides substantial proof that plaintiff was impaired physically as a result of his 1973 injury and, consequently, the company decision to suspend him did not violate the collective bargaining agreement.

Defendant urges that summary judgment is proper as to all four counts of the complaint. Apparently, the claim underlying all four counts of plaintiff's complaint is that he was discharged in retaliation for pursuing his remedy under the Jones Act. While Counts II and III allege a fraudulent misrepresentation to plaintiff that he would continue to be employed by defendant, this Court believes that such counts are inextricably tied to the claims of retaliatory discharge and would be barred if that claim is barred. Even if these claims were not barred, plaintiff's own deposition (at P.35) indicates that no representations were made to him that would mislead him. An essential element of fraudulent misrepresentation is "a false statement of material fact known or believed to be false by the party making it." *Soules* v. *General Motors Corp.*, 79 Ill.2d 282, 402 NE2d 599 (1980). Counts II and III have therefore failed to state a claim upon which relief can be granted and must be dismissed.

In Counts I and IV, plaintiff alleges retaliatory discharge. Defendant urges first that he fails to state a claim and second that even if he states a claim, it would be barred by the arbitrator's decision under the collective bargaining agreement. Thus, there are two issues before the Court:

1. Does the discharge of seaman in retaliation for his exercise of his legal right to file a personal injury action against his employer constitute a maritime tort?

2. Does the decision of an arbitrator under a collective bargaining agreement bar a cause of action for retaliatory discharge?

The Illinois Supreme Court, in *Kelsay* v. *Motorola*, 23 Ill. Dec. 559, 384 NE2d 353 (1978), recognized a cause of action for

retaliatory discharge where an employee was discharged for filing a workmen's compensation claim. In so holding, the Court found that the Workmen's Compensation Act is a humane law of a remedial nature, the enactment of which was in furtherance of public policy. *Kelsay* v. *Motorola, Id.* Clearly, the same strong public policy would underly the enactment of the Jones Act. The Court, in finding a cause of action, stated:

> ". . .As we have noted, the legislature enacted the workmen's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act. We cannot ignore the fact that when faced with such a dilemma many employees, whose common law rights have been supplanted by the Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common law or statutory. This result, which effectively relieves the employer of the responsibility expressly placed upon him by the legislature, is untenable and is contrary to the public policy as expressed in the Workmen's Compensation Act. We cannot believe that the legislature, even in the absence of an explicit proscription against retaliatory discharge, intended such a result." *Kelsay* v. *Motorola, Id.*

The Fifth Circuit has also found a cause of action for retaliatory discharge. In *Smith* v. *Atlas Off-Shore Boat Services, Inc.*, No. 80-3575, Fifth Circuit, August 21, 1981, wherein a seaman was discharged for exercising his right to recover under the Jones Act, the Court held:

> "We find the reasoning of these cases persuasive. The employer's discharge of the at-will seaman-employee, while it is in essence a lawful act, should not be used as a

means of effectuating a 'purpose ulterior to that for which the right was designed.' *Blades, supra* note 3, at 1424. The employer should not be permitted to use his absolute discharge right to retaliate against a seaman for seeking to recover what is due him or to intimidate the seaman from seeking legal redress. The right to discharge at will should not be allowed to bar the courthouse door. Nor does the struggle affect only the employer and the seaman. To permit the seaman's discharge because he resorts to the courts may result in casting the burden of the employer's reprisal in part on the public in the form of unemployment compensation or social security for the worker or his family.

The recognition of a cause of action in admiralty providing the seaman with relief from a discharge caused by his filing of a claim against the employer is particularly appropriate in light of the admiralty court's protective attitude towards the seaman. The judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrine to meet changing conditions makes the admiralty court peculiarly sensitive to the inequities inherent in the traditional rule. Moreover, this type of cause of action is not without federal precedent.

The maritime employer may discharge the seaman for good cause, for no cause, or even, in most circumstances, for a morally reprehensible cause. We conclude, however, that a discharge in retaliation for the seaman's exercise of his legal right to file a personal injury action against the employer constitutes a maritime tort." *Smith* v. *Atlas Off-Shore Boat Services, Id.*

We find the reasoning in these cases to be persuasive and, therefore hold that plaintiff's complaint is sufficient to state a cause of action in maritime law.

Defendant, however, urges that even if plaintiff has stated a cause of action, he is barred by the arbitrator's decision under the collective bargaining agreement. There is no dispute that the union contract called for compulsory and binding arbitration, that the claim was submitted to arbitration, and that the decision of the panel of arbitrators was unfavorable to plaintiff. *Alexander* v. *Gardner-Denver Co.*, 450 US 36, 94 S.Ct. 1011, 39 L.Ed2d 147 (1974) and its progeny hold that where a plaintiff's claim is founded upon a federally protected, independent statutory right, an arbitration decision does not preclude trial of the issues involved. In *Alexander* the discharged plaintiff filed a grievance against his employer under a collective bargaining agreement which expressly contained a non-discrimination clause. Prior to the hearing on the grievance, he initiated the proper procedures for a Title VII claim. After the arbitrator found he was discharged for cause, he brought a Title VII action. The Court found that plaintiff could seek enforcement of both his contractual right and his statutory Title VII claim.

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the ar-

> bitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. *Carey* v. *Westinghouse Corp.* 375 U.S. 261, 11 L.Ed.2d 320, 84 S.Ct. 401 (1964). Cf. *Smith* v. *Evening News Assn.* 371 US 195, 9 L.Ed.2d 246, 83 S.Ct. 267 (1962). There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus, the rationale behind the election-of-remedies doctrine cannot support the decision below." *Alexander* v. *Gardner-Denver, Id.*

The issue facing this Court, then, is whether the reasoning stated in *Alexander, supra,* would apply where the independent right plaintiff seeks to assert is a common law cause of action rather than the independent statutory right discussed in *Alexander.* We think it would not. As the Illinois Court, in *Cook* v. *Caterpillar Tractor Company,* 85 Ill. 3d 402, 407 NE2d 95 (3rd Dist. 1980) reasoned,

> "The issue in this case is whether *Kelsay* is applicable to a situation where an employee is not terminable at will, but instead has recourse against an employer under a collective bargaining agreement permitting discharge only for just cause and allowing for arbitration to guarantee the parties' rights. We believe that it is not. The policy considerations in *Kelsay* are not present here. In the instant case the employee is protected. As shown above, the discharge provisions of the Collective Bargaining Agreement serve to protect the employee from retaliatory discharge. Thus, the employee is free to apply for Workmen's Compensation without worrying that he will have to sacrifice his job to gain those benefits.

> In addition, there is another compelling reason not to extend the tort of retaliatory discharge. To permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would undermine the collective bargaining agreement. Grievance procedures, including arbitration, were set up to prevent industrial strife. See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409. To permit these procedures to be circumvented in a situation where the employee is protected by the procedures is to invite strife unnecessarily." *Cook* v. *Caterpillar Tractor Co. Id.*

This Court agrees with the reasoning stated above. While we are concerned with the serious allegations that defendant has maintained a practice of discharging employees who exercise their rights under the Jones Act, we still must find that the matter was arbitrated. The arbitrator was also concerned by the facts before him, but was forced to conclude that the testimony from the transcript of plaintiff's state court action was such that plaintiff's medical condition could pose a hazard to those working with him, even though he had apparently worked successfully for defendant for four years after his injury and until his Jones Act recovery. Thus, the arbitrator reluctantly found that plaintiff was discharged for just cause and that the company's decision to discharge him was not retaliatory, but rather, was justified because of the medical evidence produced at trial of which the company was previously unaware.

This Court is troubled by the apparent fact that the defendant, in the Jones Act litigation, argued that plaintiff would continue to be employed by them and should receive no loss of future earnings recovery. We still must find that the claim underlying all counts of the plaintiff's complaint was decided in the arbitrator's decision adversely to the plaintiff. Such a decision, under the *Steelworkers* trilogy, is a final and binding deci-

sion. Plaintiff was not at at-will employee but, rather, was protected by the collective bargaining agreement. He pursued his contractual remedies. Even though we believe the allegations of his complaint would state a cause of action for retaliatory discharge, we cannot find that the holding in *Alexander* can be expanded to the situation where plaintiff seeks to assert an independent common law right based on the same occurrence upon which an arbitrator's decision has been rendered. Accordingly, we find that the arbitrator's decision was final and binding and there must be deference to that decision. See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, (1960), 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409.

The motion of defendant for summary judgment on Counts I and IV on the grounds that the claim of plaintiff has been determined adversely in binding arbitration and is thus barred must be and the same hereby is granted. Counts II and III must be and the same hereby are dismissed.

IT IS SO ORDERED.

DATED: This 16 day of October, A.D. 1981.

/s/ William L. Beatty
UNITED STATES
DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.